

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-629

January 15, 2004

MAINE PUBLIC UTILITIES COMMISSION
Investigations into Implementation of the
Federal Communication Commission's
Triennial Review Order

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before **January 30, 2004**. It is expected that the Commission will consider this report at its deliberative session on **February 9, 2004**.

I. SUMMARY

In this Order, we decide not to conduct a 9-month proceeding pursuant to the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO).¹ We also determine that we do not need to conduct a batch hot cut proceeding at this time. However, we will require Verizon to update us on the status of the batch hot cut proceedings in New York and Massachusetts. Upon the establishment of process in either state, Verizon must make a filing with us describing how and when the process will be implemented in Maine.

II. BACKGROUND

The FCC's TRO contains findings and national presumptions relating to the obligations of incumbent local exchange carriers (ILECs) to provide

¹*In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (rel. August 21, 2003) (*Triennial Review Order* or *TRO*).

unbundled network elements (UNEs) pursuant to sections 251 and 252 of the Telecommunications Act of 1996. The FCC found that competitive local exchange carriers (CLECs) were impaired, on a national basis, without access to certain unbundled network elements, i.e., mass market switching and most types of transport and loops. However, the FCC also established various triggers and mechanisms by which an ILEC could contest the FCC's national finding of impairment before a state commission. In addition, the FCC directed state commissions to establish batch hot cut procedures, which allow for the smooth and rapid transition of large numbers of customers from the ILEC to a CLEC. Both the initial proceedings to rebut the FCC's presumptions and the batch hot cut proceeding must be completed within nine-months of the October 1st release of the TRO.

In a Procedural Order dated October 31, 2003, the Hearing Examiner established a deadline of November 14, 2003, for Verizon to indicate whether it would seek to rebut the FCC's national impairment findings in Maine and for CLECs to comment upon the need for a batch hot cut process in Maine.

III. LEGAL STANDARDS

The FCC's TRO set the regulatory framework for examining a request by a carrier to rebut the FCC's findings on impairment. The FCC stated that a carrier is impaired when lack of access to a specific unbundled network element (UNE) "poses a barrier or barriers to entry... that are likely to make entry into a market uneconomic." TRO at ¶ 84. The FCC made specific findings of

impairment relating to mass market switching, most loops, and most forms of transport but also established triggers and standards under which an ILEC could challenge the FCC's finding before a state commission. The FCC required states to complete their initial evaluation of any ILEC challenges within 9 months of the release of the TRO and to complete review of any later requests by the ILECs within 6 months. TRO at ¶ 339.

In conjunction with its finding on impairment in mass market switching, the FCC found that in order for carriers to compete effectively in the mass market, a seamless, low-cost batch hot cut process must be available. TRO at ¶ 487. Thus, the FCC required state commissions to approve, within 9 months of the effective date of the TRO, a batch hot cut process. TRO at ¶ 488. Alternatively, the state commission must make detailed findings regarding why such a process is not necessary in a particular market.

IV. PARTIES' POSITIONS

A. Verizon

Verizon states that it does not seek to demonstrate non-impairment in Maine for mass market switching, loops, or transport at this time and, that because of this position, there was no need for the Commission to examine the batch hot cut process issue. Verizon claims that a review of the batch hot cut process is only relevant if the ILEC challenges the application of the impairment finding for mass market switching. Because Verizon does not contest the impairment finding and the UNE-platform will continue to be available in Maine, it

is not likely that there will be an increase in hot cut volumes and thus no need for a batch process.

B. AT&T

AT&T contends that, while CLECs continue to face operational and economic impairment in serving the mass market, since Verizon has chosen not to contest the FCC's impairment findings, there is less of a need to conduct a batch hot cut process. If at some time in the future the Commission commences an impairment proceeding pursuant to a Verizon request, the Commission would need to address the hot cut issues as well. AT&T encourages the Commission to monitor the proceedings in New York relating to hot cuts.

C. MCI

MCI argues that, even if Verizon does not contest the FCC's impairment findings, the Commission must establish a hot cut process within 9 months. MCI points out that 47 C.F.R. § 51.319(d)(2)(ii) is not conditioned upon the outcome of an impairment proceeding or the lack of challenge by an ILEC. According to MCI, the Commission must either establish a hot cut process or make a finding that carriers do not need such a process. MCI claims that while the lack of a batch hot cut process has not yet hindered its entry into Maine, as it moves to facilities-based service for mass market customers, a batch hot cut process will be necessary. MCI does believe, however, that proceedings in jurisdictions such as New York should inform this Commission's review of the issues. MCI requests that the Commission order Verizon to indicate how it plans

to implement a batch cut process in Maine and then hold a procedural conference to discuss how best to proceed.

IV. DECISION

We first find that, because Verizon does not seek to dispute any of the FCC's impairment findings in Maine, we will not conduct a 9-month proceeding. We believe that conducting the detailed economic and operational analyses required by the FCC would be premature here in Maine and an unnecessary diversion of the Commission's and carriers' resources. If and when Verizon decides to challenge the FCC's impairment findings in Maine, we will conduct the necessary proceedings.

We also find that it is unnecessary at this time to conduct a detailed batch hot cut process proceeding in Maine. First, the section of the FCC's Rules requiring a state to conduct a batch hot cut proceeding, 47 C.F.R. § 51.319(d)(2)(ii), specifically references § 51.319(d)(2)(i), which applies only when the state commission conducts a 9-month impairment proceeding. If a state does not conduct a 9-month proceeding, and therefore does not define any markets pursuant to § 51.319(d)(2)(i), there is no obligation to establish an ILEC batch hot cut process nor any obligation to make detailed findings establishing the lack of need for a batch process pursuant to § 51.319(d)(2)(B).

We do, however, agree with MCI and AT&T that eventually Maine may need a batch hot cut process and that it makes sense to build upon the processes established in other Verizon jurisdictions. Indeed, to the extent that

either New York or Massachusetts develops a process, we see no reason why that process should not be available to CLECs in Maine. During our consideration of Verizon's 271 Application, we relied upon Verizon's assurances that its systems were the same or very similar in old Bell-Atlantic North region (New York, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine).

To ensure that we are kept abreast of developments in other states, we order Verizon to submit a quarterly report updating us (and the service list of this case and the Wholesale Tariff case, Docket No. 2002-682) regarding the progress of the New York and Massachusetts batch hot cut process proceedings. Verizon should also notify us if New Hampshire, Vermont, or Rhode Island adopt a batch hot cut process. Within 90 days of the final adoption of batch hot cut process in either New York or Massachusetts, Verizon must make a filing with us describing how and when the new batch hot cut process can be implemented in Maine.

Respectfully submitted,

Trina M. Bragdon
Hearing Examiner